APPENDIX A

HOUSE OF REPRESENTATIVES

57th Congress
2nd Session.

Report
No. 3765

Regulating Commerce with Foreign Nations, etc.

February 12, 1903.—Referred to the House Calendar and ordered to be printed.

Mr. Mann, from the Committee on Interstate and Foreign Commerce submitted the following:

REPORT

(To accompany S. 7053)

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (S. 7053) to further regulate commerce with foreign nations and among the states, having had the same under consideration, beg leave to report as follows:

The purpose of this bill is to increase the efficiency of the present interstate-commerce law. There are four principal propositions included in the bill.

First. The present law provides that any director or officer of a corporation, common carrier, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who violates the provisions of the interstate-commerce act shall be guilty of a misdemeanor and punished by a fine not

exceeding the sum of $5,000 and by imprisonment for a term of not exceeding two years, or by both fine and imprisonment.

No penalty is aimed directly at the corporation itself by the existing law. The bill which we recommend does away with the penalty of imprisonment and provides that the violation of the law by any officer, agent, or other person acting for the corporation shall be deemed a violation by the corporation itself, and shall subject the corporation offending to a fine of not less than $1,000 nor more than $20,000 for each offense.

In extensive hearings before your committtee upon the general subject of proposed amendments to the interstate-commerce law it was strongly urged by the members of the Interstate Commerce Commission that the provisions of existing law providing for punishment of the officers and agents of railroads, but not for the punishment of the railroad itself, prevented the enforcement of the law forbidding rebates and discriminations.

The experience of the Interstate Commerce Commission has been that it is impossible to obtain proof of the granting of a rebate by the officer of a railroad to some favored shipper unless the officer himself gives the evidence, in which case he is free from prosecution. It is not proposed in the pending bill to do away with the penalty of fine against the officer of the railroad who violates the law, but to extend the penalty to the corporation itself. With this bill enacted into law, if a rebate is illegally granted by the officer of a railroad, he may be called upon to testify, and if he tells the truth he will be absolved from prosecution, but his railroad will be subject to

a penalty of $20,000 for each offense. We call attention to some of the statements made before our committee by members of the Interstate Commerce Commission.

Hon. Martin A. Knapp, chairman of the Interstate Commerce Commission, in his testimony before us stated:

> Two difficulties at once arise, and those difficulties I beg to submit to you are of very different character and require very different treatment. The first difficulty is how are you going to compel the observance of these tariffs when they are once published; that is, *how are you going to stop rebating and rate cutting and all those different devices by which one shipper in a given locality gets better rates than his business rivals? The way the present law undertakes to prevent that kind of evil is to say that rebates and rate cutting and all secret arrangements which are preferential in their character are misdemeanors and are to be punished as such, and I do not know any other way to treat that class of difficulties.* Of course, I think there is perhaps something to be said in favor of supplementing that treatment with one which should subject the carriers engaging in such practices to a forfeiture to be recovered in a civil action; but aside from those two remedies I know of no other which can be applied to this class of misdemeanors or offenses.
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> Now, there are two respects in which the present law, in its attempt to reach and prevent and punish those who permit these practices, has proven to be entirely inadequate. The first of these is that the corporation carrier is not liable, but only the officer, the agent, or representative. That is to say, the real offender, the corporation, which is the bene-

ficiary of the illegal arrangement, is not under any liability. Now, that has two very unfortunate results. One is that you can not obtain voluntary testimony under such circumstances. Offenses of this kind are not like those against rights of property, which are sought to be prevented by general laws, because in those cases there is always somebody who is injured, there is somebody who is in the attitude of prosecutor, there is somebody who is not only willing but desires to bring the offending party to justice. *But when a railroad officer makes a secret compact with a shipper which gives him a lower rate than the public are required to pay, both parties are presumably benefited by the transaction;* neither wants to expose it and ordinarily neither of them will disclose it; certainly not by any voluntary action. Railroad officials of that grade which participates actually in transactions of this kind are a sort of fraternity; they are like lawyers and are personally intimate with each other, and over and over again they tell us that they will not under any circumstances give evidence or be in any way connected with the effort to disclose the truth of those transactions when the result of that disclosure might be to inflict punishment and suffering upon some friend or send some associate to jail.

Now, directly connected with that is the further fact that the shipper is not directly benefited by this rate at all, unless the secret rate gives him an actual discrimination against some other shipper, but that is something that very rarely happens, because these rebates and secret arrangements are not ordinarily made with the isolated individual shipper, but they are made with great combinations of shippers; they are made ordinarily under circumstances such that the transaction covers practically all

the traffic that moves from a given point. Consequently there is no actual discrimination between the shippers.

Now, let me speak further of the difficulties —let me go one step further—the difficulties growing out of the fact that the corporation is not itself liable. In the first place, the Commission conceivably can take up an instance and keep calling witnesses and forcing them to testify until they have narrowed the question down to just some few, or perhaps one, of the officials of the company. Then what have you found? Some subordinates, some assistant traffic manager, most likely some clerk, who actually did the thing.

Who wants to indict him, a subordinate, a clerk carrying out the implied if not the expressed orders of his superiors, a man whose position depended on his doing what he did? Nobody wants to send such a man as that to jail or to mulct him with a fine that he could not possibly pay, and it is anomalous and it does not satisfy one's sense of justice to say that the corporation, the real beneficiary of the transaction, should go scot free, and that the only person who can be reached is some subordinate agent who is merely in charge of this operation.

Another thing right in that connection. Under the Constitution every man who is examined before the Commission or before any court and compelled to testify thereby secures perfect immunity for himself. He can not be prosecuted for that; so that the further the Commission goes in ferreting out the details the further it goes in letting loose the very men who are guilty. Every man we call is granted absolute immunity.

Now, what happens?

This illustrates another phase of this same question; men high up in railroad circles, men

known to you all by name, and many of them personally, came before us in Chicago and admitted exactly what they did, and said that they were personally responsible for it. They were perfectly safe in doing that. Every one of them thereby secured absolute immunity. But when you asked one of those men what particular shipper he paid money to, and on what day, he would refuse to tell. He will say that he does not know, and generally he does not know. *What happens, apparently, is this: The president or some executive officer in charge of traffic makes the bargain; he does not attend to the details; he does not know about a particular shipment or a particular payment;* and also whatever record there may be made at any time in connection with the transaction, so that the understanding may be known to the parties, is immediately destroyed. In every instance they testified that no records remained, that their books would show nothing, and they themselves, although they admitted the responsibility for what was done, had no knowledge of any particular transaction.

It is idle to suppose that you can apply criminal remedies in the state of the criminal law for the correction of such abuses. It does not happen; it will not happen. But I believe that if the corporation could be indicted, if the officials, the subordinate officials, the competitors, or their representatives, or anybody having knowledge of the transaction could be examined before the Commission and compelled to disclose the facts on which the corporation was liable, then the corporation could be indicted and mulcted with a fine. Until that can be done, and corporation carriers be subjected to large pecuniary losses as a result of these offenses, not much will happen to correct them in the way of criminal remedies.

Mr. Stewart: Do you not think that imprisonment in addition to a fine would have a good effect?

Mr. Knapp: No, Mr. Stewart, I do not. While I regard these offenses as involving, in many cases, a very high degree of moral turpitude, and I think there are more serious wrongs against order and the inalienable rights of the citizen than burglary or larceny, still we have to take the facts as they are and public sentiment as it exists, and in view of that it is my judgment that punishment by imprisonment instead of being an aid is a hindrance. It is a thing which operates against getting information necessary to convict.

Mr. Stewart: Do you think a fine, however large, would deter these large corporations?

Mr. Knapp: Yes; and then there is another reason. You can not do anything to a corporation except fine it, and it does not quite satisfy the sense of justice to say that the real offender shall only be fined, while some paid subordinate in lesser degree may possibly go to jail. Now, I believe that if we could get this law in shape where it would be practically feasible, and in many cases comparatively easy to prove the offense against the corporation, and that corporation could be held to pay a large fine, it would not be simply the pecuniary loss, but the publicity—the fact that the railroad has been indicted and compelled to pay a large fine—would operate as a powerful deterrent, and I do not think we shall get along very far in preventing rate cutting by criminal methods until you gentlemen change the law in that regard.

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Mr. Corliss: What information have you upon the subject with reference to the railroad corporations themselves—the officers of the

railroads—as to their position upon that question?

Mr. Knapp: All that I know about that, Mr. Corliss, is what they tell us. Over and over again railroad officials have said to me, "You can not expect—it is against human nature; appeal to your own experience, your own feelings—you can not expect that I will give testimony that may possibly result in the fining of my associate and friend over here who occupies a similar relation to another railroad to that which I occupy to mine. I am not going to become an informer against him.

But they all say that if the result of the disclosure and prosecution would be a fine against the other man's corporation they would not hesitate to furnish the proof and would actively engage in the prosecution.

This is the statement made to us. You can judge of the truth of it and the probabilities as well as I can.

And these two amendments, the one which would make the corporation themselves liable, and the one which would make the shipper liable, without the necessity of proving absolute discrimination—these two amendments ought to be made at once, at this session, if no others are made.

* * * * *

I would do just as they do on the other side. I would make the corporation liable, and also its officers and agents, and also the shipper liable, and also his officers and agents. But I think there is much in keeping them both in from this point of view. Now, see what the actual situation is. Remedies of this kind must be applied by the Federal courts and the Federal district attorneys. All that the Commission can ever do is to furnish information on which they shall proceed. Now, each situation therefore ought to be inquired of and dealt

with in reference to its peculiar circumstances, *and when a case of extensive rebates or cut rates is brought to the attention of the Federal authorities, it might be a case where, in their judgment, the more guilty party was the shipper and the one more easily convicted the carrier, or it might happen that the more guilty was the carrier and the one more easily convicted was the shipper, and it seems to me that those who are charged with the responsibility of enforcing the law ought to have the opportunity, as they practically would under this proposed law, of deciding against which one of the parties they would proceed.*

* * * * *

I want to repeat that there are two changes in the law relating to the enforcement of criminal remedies which are important, against which there is no reasonable objection, against which I venture to say no one will come here and interpose opposition. They are that the corporation carrier shall be made liable, and not simply its agent and representative, and that the shipper shall be made liable who knowingly accepts a lower rate than that provided by the published tariff without being obliged to show that he thereby secured a discrimination in favor of himself and against his business rivals.

Those two changes in the tenth section would greatly aid, in my judgment, the practical administration of the criminal machinery devised for preventing rebates and compelling carriers to observe their published schedules.

Hon. Joseph W. Fifer, a member of the Interstate Commerce Commission, in his testimony before the committee said:

Now, how are you going to prevent, how are you going to stop, these violations of the act

which are made criminal? You have been told by my colleagues that there is no penalty denounced against the carrier by the law, and that is true. *Gentlemen, these violations are* what the law calls *malum prohibita,* and I care not what certain individuals may think of it, mankind generally hold that the same moral turpitude does not attach to an act of that kind as does to a crime, which is *malum in se,* such as burglary and larceny, crimes in the absence of all law.

And you can see, bearing that in mind, what a great difficulty confronts the Commission when it undertakes to enforce the criminal features of the act. Many statutory prohibitions, acts that are made misdemeanors by a statute, a short time ago were no offenses at all. Yesterday the act violated no law; today it is made a penal offense, and the offender is subject to a heavy fine and a term in the penitentiary.

These men have friends, they have standing in the community. The whole community may know that they have at different times violated the law, but they have just as many friends as they had before. They are not ostracized in society; and you undertake to convict one of them, and you meet great difficulties. Now, what should be done? Judge Knapp has told you, and in that I agree with him, that the corporation itself should be made subject to indictment, and upon conviction it should be punished; of course, it cannot be imprisoned it loses no caste in society, and every person who is cognizant of the facts can be compelled to testify and there is no immunity; and you know, as practical men, under those circumstances you can get testimony and you can get conviction, and if the penalty is large enough, fixed by the law, it will be just as much of a deterrent as the other, and the testimony will be easily acquired.

I have been on the Commission for a little over two years; I have heard many railroad men testify, and I do not recollect that in any instance we ever secured testimony that would justify an indictment until the hearing in Chicago last January. We have probed that question, at least in some cases. In this very case we went, in the first instance to Kansas City. We got nothing. We followed it up and went to Chicago, and a clean breast was made of the whole thing. They testified that there was a secret cut, and I think some of them, at least, testified that only one man would know of it. In most instances papers were destroyed bearing the evidences of the violation; no books were kept. How are you going to dig out and get hold of any particular individual? And when you get him you put him on the stand and he has immunity from punishment. How are you going to deal with that.

There is another provision of the criminal law that I think ought to be amended, and that it is to make the departure from a published rate punishable and treated as an unjust discrimination. My friend, Mr. Mann, asked a very pertinent question yesterday in regard to these packing-house rates from the Missouri River to Chicago. There are only a few great packing-houses, and I believe—and I think that is the opinion of all my colleagues—that there was no unjust discrimination in that instance. Although a departure from a published rate, and although in a sense a secret rate, all the persons or corporations who could avail themselves of that cut rate knew of it in some way. The rate on packing-house products from the Missouri River points, the published rate, was 23½ cents. They were actually carrying the goods for 18½ cents, 5 cents less.

Second. *The existing law prohibits rebates and discriminations, but does not prevent the cutting of published rates unless discrimination is shown.* In most cases it is practically impossible to show the discrimination. In the investigations made by the Interstate Commerce Commission respecting rates on dressed beef and packing-house products from Kansas City and Chicago *it was finally discovered that for years the railroads had constantly and habitually disregarded their published tariffs* and had carried such products at rates below the published rate and the actual rate amounted to millions of dollars a year; and it was the unanimous testimony that all the shippers who were interested in those rates got practically the same rate. There was, therefore, no discrimination between the shippers, and no shipper was liable to prosecution for obtaining a rate which discriminated in his favor. But the effect of such secret cutting of rates is to place in the business, because *no person can afford to enter into competition who does not receive the cut of rates, and no person is in a position to demand or receive such cut until after he shall have become established in business and have an extensive business behind him.*

The bill which we recommend provides a penalty, by fine of not less than $1,000 nor more than $20,000, against any person or corporation which shall give or receive any rebate, concession, or discrimination in respect of the transportation of property whereby such property shall be transported at a less rate than that named in the tariffs published and filed in accordance with the interstate-commence law. *This provision makes it a penalty against the railroad company to give to anyone a rate less than the published rate*

while that rate remains in force, and it also makes it a penalty against any person receiving the benefit of a rate less than the published rates.

Chairman Knapp stated to your committee that he favored making it a penal offense to make any departure from the published rates whether there be a discrimination or not. Mr. Knapp said:

> I want two things; I want the corporation carrier made liable, and I want the shipper made liable when he accepts a preference or secret rate whether there is discrimination or not.

Third. Section 2 of the bill makes it lawful to include as parties to any proceeding for the enforcement of the Interstate Commerce Act, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and authorizes final judgment against such additional party. This is a much-needed amendment to the act, for the purpose of enabling all parties in interest to be brought before the court in the same suit.

Fourth. The first and second propositions above referred to practically exhaust the power of legislation to prevent rebates and discriminations through criminal prosecutions. *We conceive it to be the desire of Congress to absolutely prevent, if possible, the granting of discriminations in the way of railroad rates to favored shippers. This is by many claimed to be the greatest abuse of the day.* But we all know that the officers of the railroads who grant rebates and the officers of the private corporations who solicit and accept them are men of high standing in their respective communities, and that it is a very difficult matter to obtain evidence sufficient to indict them, and

still more difficult to obtain judges and juries who will convict them.

It is proposed, therefore, to provide a civil remedy as well as a criminal remedy against rebates and discriminations.

The bill proposes to confer jurisdiction upon the equity courts of the United States to summarily hear petitions filed by the Interstate Commerce Commission, and upon such hearing to issue writs of injunction and other process prohibiting and forbidding the granting of rebates or the cutting of rates, enforcing observance of the published tariffs and requiring discontinuance of discrimination. In a case commenced by the Interstate Commerce Commission against various railroads before Judge Grosscup, in Chicago, that judge said in March last:

> The question presented by this application is a new one and a very great one, and I will not pass upon it finally until there have been elaborate arguments on each side. If the United States courts, sitting in equity, have the power called for, it will make them master of the whole rate situation, for an inquiry instituted by them to inquire whether the injunction has been violated or not will, much more readily than criminal proceedings, probe to the bottom of the railroad's doings. For my own part, I believe that railroad rates ought to be as stable as postage rates, so that every shipper would know, as certainly as the sender of a letter, how much it would cost him and the fact that no one else could send it for less. An injunction something like this has been granted in other cases, notably in the Debs case, but an important distinction between that case and this is that in the Debs case, the things complained of were in their nature temporary,

while in this case the injunction will be against conduct running continuously into the future. The interstate-commerce act has hitherto been ineffectively executed, but the taking of such power by the courts, as this injunction implies, might turn out to be the vitalizing of the act.

Your committee believes that the legislation proposed by the Elkins bill, together with the present interstate commerce law, covers about all the ways that thought or language can devise, or describe to prevent the granting of discriminations in favor of one shipper as against another, or the building up of one concern through the favoritism of railroad corporations.

Your committee recommends the following amendments to the bill S. 7503.

In line 9, page 1, after the word "shall" insert the word "also."

In line 23, page 4, strike out the words "it shall be authorized to present," and insert after the word "petition" in the same line the words "may be presented."

In line 18, page 5, after the word "States," insert "whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission."

In line 11, page 6, strike out the words "or corporation."

In line 13, page 6, strike out the words "or it."

Insert at the end of section 3 the following:

"PROVIDED, That the provisions of an act entitled 'An act to expedite the hearing and

> determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." "An act to regulate commerce," approved February 4, 1887, or any other acts, having a like purpose that may be hereafter enacted,' approved February 12, 1903, shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission."

The last amendment is for the purpose of giving to suits commenced in the name of the Interstate Commerce Commission the benefit of early hearing and disposition in the same manner as is provided for suits commenced in the name of the United States by the recent act.

The other amendments are for the purpose of making the act more complete and effective.

As amended your committee recommends the passage of the bill S. 7053.

APPENDIX B

Par. 15, 16, 17, Sec. 1. Act to Regulate Commerce as Amended. Sec. 402 Transportation Act 1920.

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after sub-

sequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

(16) Whenever the Commission is of opinion that any carrier by railroad subject to this Act is for any reason unable to transport the traffic offered it so as properly to serve the public, it may, upon the same procedure as provided in paragraph (15), make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable.

(17) The directions of the Commission as to car service and to the matters referred to in paragraphs (15) and (16) may be made through and by such agents or agencies as the Commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this Act, and of their officers, agents, and employees, to obey strictly and conform promptly to such orders or directions

of the Commission, and in case of failure or refusal on the part of any carrier, receiver, or operating trustee to comply with any such order or direction such carrier, receiver, or trustee shall be liable to a penalty of not less than $100 nor more than $500 for each such offense and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States; *Provided, however,* that nothing in this Act shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this Act.

APPENDIX C

EMERGENCY COAL ACT

(Sept. 22, 1922, 42 Stat. 1025)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that by reason of the prolonged interruption in the operation of a substantial part of the coal-mining industry in the United States and of the impairment in the service of certain carriers engaged in commerce between the States and by reason of the disturbance in economic and industrial conditions caused by the World War a national emergency exists which endangers the public health and general welfare of the people of the United States, injures industry and business generally throughout the United States, furnishes an opportunity for the disposition of coal and other fuel at unreasonably high prices, limits the supply of heat, light, and power, threatens to obstruct and hamper the operation of the Government of the United States and of its several departments, the transportation of the mails, the operation and efficiency of the Army and the Navy, and the operation of carriers engaged in commerce among the several States and with foreign countries.

Sec. 2. That the *powers of the Interstate Commerce Commission under the Act entitled "An Act to regulate commerce," approved February 4, 1887, as amended, including the Transportation Act, 1920, and especially under section 402 of said Transportation Act, 1920, are, during the aforesaid emergency, enlarged to include the authority to issue in transporta-*

tion of coal or other fuel orders for priorities in car service, embargoes, and other suitable measures in favor of or against any carrier, including vessels suitable for transportation of coal on the inland waters of the United States which for such purpose shall be subject to the Interstate Commerce Act, or region, municipality, community, or person, copartnership, or corporation, and to take any other necessary and appropriate steps for the priority in transportation and for the equitable distribution of coal or other fuel so as best to meet the emergency and to promote the general welfare, and to prevent upon the part of any person, partnership, association, or corporation the purchase or sale of coal or other fuel at prices unjustly or unreasonably high. This Act shall not be construed as repealing any of the powers heretofore granted by law to the Interstate Commerce Commission but shall be construed as conferring supplementary and additional powers to said commission and as an amendment to section 1 of the Interstate Commerce Act, and subject to the limitations and definitions of commerce controlled by said Act, and all powers given said Interstate Commerce Commission shall be applicable in the execution of this Act.

Sec. 3. Because of such emergency and to assure an adequate supply and an equitable distribution of coal and other fuel, and to facilitate the movement thereof between the several states and with foreign countries, to supply the Army and Navy, the Government of the United States and its several departments, and carriers engaged in interstate commerce with the same during such emergency, and for other purposes, and for the further purpose of assisting in carrying into effect the orders of the Interstate Commerce Commission made under existing law or under

section 2 hereof, there is hereby created and established an agency of the United States to be known as Federal Fuel Distributor, whose appointment shall be made and compensation fixed by the President of the United States. Said distributor shall perform his duties under the direction of the President.

Sec. 4. It shall be the duty of the Federal Fuel Distributor to ascertain—

(a) Whether there exists within the United States or any part thereof a shortage of coal or other fuel and the extent of such shortage;

(b) The fields of production of coal and other fuel and the principal markets to which such production is or may be transported and distributed and the means and methods of distribution;

(c) The prices normally and usually charged for such coal and other fuel and whether current prices, considering the costs of production and distribution, are just and reasonable; and

(d) The nature and location of the consumers; *what persons, copartnerships, corporations, regions, municipalities, or communities should,* under the acts to regulate commerce administered by the Interstate Commerce Commission, including the Transportation Act, 1920, *in time of shortage of coal and other fuel, or the transportation thereof, receive priority in transportation and distribution,* and the degree thereof, and any other facts relating to the production, transportation, and distribution of coal and other fuel; and when so ascertained the Federal Fuel Distributor shall make appropriate recommendations pertaining thereto to the Interstate Commerce Commission from time to time either on his own motion or

upon the request of the commission, *to the end that an equitable distribution of coal and other fuel may be secured so as best to meet the emergency and promote the general welfare.* All facts and data within the possession of the Federal Fuel Distributor shall be at all times accessible and furnished to the Interstate Commerce Commission upon its request. The Interstate Commerce Commission is hereby authorized and directed to receive and consider the recommendation of the Federal Fuel Distributor, based upon his reports upon the foregoing subjects, and any other information which it may secure in any manner authorized by law.

Sec. 5. The Federal Fuel Distributor may make such rules, regulations, and orders as he may deem necessary to carry out the duties imposed upon him by this Act and may co-operate with any department or agency of the Government, any State, Territory, district, or possession, or department, agency, or political subdivision thereof, or any person or persons, and may avail himself of the advice and assistance of any department, commission, or board of the Government, and may appoint or create any agent or agency to facilitate the power and authority herein conferred upon him; and shall have the power to appoint, remove and fix the compensation of such assistants and employees, not in conflict with existing laws, and make such expenditures for rent, printing, telegrams, telephones, furniture, stationery, office equipment, travel, and other operating expenses as shall be necessary for the due and effective administration of this Act. All facts, data, and records relating to the production, supply, distribution, and transportation of coal and other fuel in the possession of any commission, board, agency, or department of the

Government shall at all times be available to the Federal Fuel Distributor and the Interstate Commerce Commission, and the person having custody of such facts, data, and records shall furnish the same promptly to the Federal Fuel Distributor or his duly authorized agent or to the commission on request therefor.

Sec. 6. *That whenever the President shall be of the opinion that the national emergency hereby declared has passed he shall by proclamation declare the same, and thereupon, except as to prosecutions for offenses, this Act shall no longer be in force or effect, and in no event shall it continue in force and effect for longer than twelve months from the passage thereof.*

Sec. 7. Every person or corporation who shall knowingly make any false representation to the Interstate Commerce Commission or the Federal Fuel Distributor, or to any person acting in their behalf or the behalf of either of them, respecting the price at which coal or other fuel has been, is being, or is to be sold or bought, the inquiry being made for the purposes of this Act, *or whoever having obtained coal or other fuel through a priority order or direction shall dispose of the same for purposes other than those for which said priority order or direction was issued without the consent of the Interstate Commerce Commission, shall be deemed guilty of a misdemeanor,* and upon conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided,* That any person or any officer or director of any corporation subject to the provisions of this Act, or the Interstate Commerce Act and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or per-

son acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term not exceeding two years, in the discretion of the court. Every violation of this section may be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation is committed, or through which the transportation is conducted, or in which the car service is performed, or in which such concession or discrimination is granted, or given, or solicited, or accepted, or received; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

Sec. 8. There is hereby authorized to be appropriated the sum of $250,000, available until expended, for the purposes of this Act, including payment of personal services in the District of Columbia and elsewhere, and all expenses incident to organizing the work of the President's fuel distribution committee, and not exceeding $50,000 thereof shall be available for reimbursement and payment upon specific approval of the President of expenses incurred since May 15, 1922, in connection with the work of the President's fuel distribution committee organized for the purpose of helping to meet the emergency existing in the matter of fuel.

Approved, September 22, 1922.

(Italics ours.)

APPENDIX D

SECTION 10—ACT TO REGULATE COMMERCE

(Acts Feb. 4, 1887, c. 104, § 10, 24 Stat. 382; March 2, 1889, c. 382, § 2, 25 Stat. 857; June 18, 1910, c. 309, § 10, 36 Stat. 549).

Sec. 10. [*As Amended March 2, 1889, June 18, 1910, and February 28, 1920.*] (3) Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent of connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation; or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for dam-

age or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court: PROVIDED, That the penalty of imprisonment shall not apply to artificial persons.

CONTENTS

CASES CITED

STATUTES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 217

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

MICHIGAN PORTLAND CEMENT COMPANY,
DEFENDANT IN ERROR

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE DEFENDANT IN ERROR

DEFENDANT'S DEMURRER

The Counsel for the Government do not refer to all the grounds of the defendant's demurrer. (Brief p. 13.)

In addition to the points referred to by the Government we also raised the point that Service Order No.

23, paragraph 7, did not call for the *transportation* of coal according to any prescribed "classes of purposes" and "order of classes" and that, while by paragraph 1 of the order, preference and priority in *transportation* were to be given, among other things, to coal as a commodity, the extent of paragraph 7 was to call for "classes" and "order" only as to *car service* (R. p. 40). The defendant in error was indicted for securing a concession in *transportation.*

ARGUMENT

SUMMARY

A. The Elkins Act has no application to the acts charged.

1. This Court in passing upon the Elkins Act will not adopt a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy.

2. The Elkins Act does not make criminal the violation of an order of the Commission, only the violation of a published tariff.

3. Except as the thing is only offered or solicited, the Elkins Act forbids only collusive dealings between carrier and shipper as to tariff rates, rules, practices and regulations.

(a) The word "device" in section 1 does not qualify the second "whereby" clause, but relates only to published rates.

(b) Under the express language of the Act where granting or giving, accepting or receiving is charged, there must be a co-transgressor.

4. The decisions of this court do not support the contention of the Government that the taking of an advantage by a shipper, there being no collusion on

the part of the carrier, is a crime punishable by the Elkins Act.

B. The commission's Service Order No. 23, paragraph 7 (Government's Brief, p. 47) prescribed "classes of purposes" and "order of classes" only with respect to *car service*, not *transportation*. Defendant in error was indicted for securing preferential treatment in *transportation*, when Service Order No. 23 did not deny it *transportation*. The Commission had no power to fix rules and regulations giving preferences and priorities in car service until the passage of the Emergency Fuel Act (Act of September 22, 1922, c. 413, 42 Stat. 1025).

A. THE ELKINS ACT HAS NO APPLICATION TO THE ACTS CHARGED.

1. THIS COURT IN PASSING UPON THE ELKINS ACT WILL NOT ADOPT A STRAINED AND ARTIFICIAL CONSTRUCTION, BASED CHIEFLY UPON A CONSIDERATION OF THE MISCHIEF WHICH THE LEGISLATURE SOUGHT TO REMEDY.

United States v. Harris, 177 U. S., 305, 309:

> "Was it the purpose of Congress when prescribing a penalty for any company, owner or custodian of animals who knowingly and willingly fails to comply with the directions of the statute, to include receivers? Can we fairly bring receivers within the penal clause by reasoning from a supposed or an apparent motive in Congress in passing the Act?
>
> "It was the view of the courts below that receivers were plainly not within the letter of the statute, and not necessarily within its pur-

pose or spirit; and an attentive examination has brought us to the same conclusion.

"It must be admitted that, in order to hold the receivers, they must be regarded as included in the word 'company.' Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the Government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

The cases cited by the Government do not apply in support of its contention that a broad construction should be given to the Act, unhampered, it would seem, even by the express language of the enactment and the stated intention of the congressional committee having the legislation in charge.

Logan v. Davis, 233 U. S. 613, is a civil case. As authority for the interpretation which the court gives

the statute, reference is made to *United States v. Southern Pacific Railroad Company,* 184 U. S., 49, 56, also a civil case, which was decided upon equitable principles.

In *United States v. Lacher,* 134 U. S., 624, the court said:

> "We entertain no doubt that two classes of offences were intended to be created by section 5467, one relating to embezzlement of letters, etc., and the other to stealing the contents, and that this construction is not reached in violation of any rule of construction applicable to penal statutes."

Certainly the bare citation of that case does not prove that Congress intended "everything" by the Elkins Act.

United States v. Martin, 176 Fed. Rep., 110, 113, also states an accepted and well known rule, and one as readily citable by defendant in error. Penal statutes are to have no enlargement by implication, no extension to cases not fairly within their terms, but a sensible interpretation.

The "hobo" picking the pocket of the conductor of cash fares, is only one of many such illustrations that can be given. If a man, by force, seizes a railroad company's locomotive and hauls a car of freight from the company's yard to his factory, he, while guilty doubtless of a serious crime, is not violating the Elkins Act. Or if a man ships in interstate commerce intoxicating liquor to himself and then in a lonely place

holds up the train and retakes possession of his property, is he to be punished under the Act? We apprehend the Government would seek some other criminal statute, and even if hard put to find one, would not proceed under the statute under review.

The application of the rule of intention is all we contend for here, but there must not be a "strained and artificial construction" put upon words to find an alleged intention.

Louisville & Nashville R. R. Co. v. Mottley, 219 U. S., 467, 474:

> "That intention is to be gathered from the words of the act, interpreted according to their ordinary acceptation, and, when it becomes necessary to do so, in the light of the circumstances as they existed when the statute was passed. *Platt v. Union Pacific R. R. Co.,* 99 U. S. 48, 64. The court cannot mold a statute simply to meet its views of justice in a particular case."

The illustration (brief p. 34) put by the Government of a carrier favoring shipper A, where the shipper's conscious participation is hard to prove, counts for nothing in the decision of this case. This difficulty which the Government conjures up for itself is easily dissipated by a reading of paragraphs (6) and (12) of Section 1 of the Interstate Commerce Act (41 Stat. L. 475-76). Under (6) the carrier must observe and enforce just and reasonable regulations and practices. Under (12) failure or refusal of a carrier to make a just and reasonable distribution of cars for the trans-

portation of coal, is declared to be unlawful and a penalty is fixed. Furthermore, under (13) of Section 1, the Commission can require the carrier to file with it all rules and regulations relating to car service (and this we believe the carriers are in the practice of doing). Then under Section 1 of the Elkins Act (Ch. 708, 32 Stat. 847; Ch. 3591, 34 Stat. 587) we read: "The wilful failure upon the part of any carrier subject to said Acts * * * or strictly to observe such tariffs until changed according to law, shall be a misdemeanor" etc.

Counsel distinguish between discriminations, rebates and concessions, arguing, apparently, that a rebate or discrimination is something consciously yielded by the carrier, while it was a "concession" which defendant in error took or received (brief 24-25). If there is force in the distinction indulged in, and we do not say there is none, the excerpts quoted by counsel from the Committee report, would appear to refute the intention imputed to Congress.

That intention is plainly limited to "the granting of discriminations * * * or the building up of one concern through the favoritism of railroad corporations." That, then, was the full extent of the application of the Act as intended by the legislature.

2. THE ELKINS ACT DOES NOT MAKE CRIMINAL THE VIOLATION OF AN ORDER OF THE COMMISSION, ONLY THE VIOLATION OF A PUBLISHED TARIFF.

The Elkins Act is entitled "An Act to further regulate commerce with foreign nations and among the

States" (Ch. 708, 32 Stat. 847). In other words, it was intended by Congress to give greater effect to the Act to Regulate Commerce (Ch. 104, 24 Stat. 380) and other acts amendatory thereof. The language of each enactment is, in some respects, necessarily similar. *Nichols & Cox Lumber Co. v. United States,* 212 Fed. Rep. 558; 129 C. C. A. 124.

Section 6 of the Interstate Commerce Act (41 Stat. 483) requires the common carriers subject thereto to file with the Commission and print and keep open to public inspection schedules showing all the rates, fares and charges, etc. Such schedules shall also state separately "all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect or determine * * * the value of the service rendered to the passenger, shipper or consignee. * * * The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act."

Section 1 of the Elkins Act provides a penalty for the wilful failure of any carrier to file and publish "the tariffs or rates and charges as required by said Acts," or for the failure of the carrier "strictly to observe such tariffs." Then, in the same sentence, as the next and concluding clause, the prohibition under which defendant in error has been called to account, is stated. What meaning and effect are to be given to the words and their context? The Act first states the penalty for the carrier's failure to fix the standard of the rates to be charged or the privileges or

facilities to be granted or allowed, and then proceeds to make it unlawful for any person or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, advantage or discrimination,—that is, *something other than that which has been made uniform and become standardized through the tariff publication.*

Davis v. Cornwell, 264 U. S. 560, 562:

> "*Chicago & Alton R. R. Co. v. Kirby,* 225 U. S., 155, settled that a special contract to transport a car by a particular train, or on a particular day, is illegal, when not provided for in a tariff. That the thing contracted for in this case was a service preliminary to the loading is not a difference of legal significance. The contract to supply cars for loading on a day named provides for a special advantage to the particular shipper, as much as a contract to expedite the cars when loaded. * * * The paramount requirement that tariff provisions be strictly adhered to, so that shippers may receive equal treatment, presents an insuperable obstacle to recovery."

Hence, the court held that the special contract counted upon, to furnish cars on a day named, was void as not provided for in the published tariffs of the carrier.

It follows from the reasoning of the two foregoing cases that if offers to give expedited transportation or preferential placement of cars for loading must be published and filed, in order to be effective, so the

denial of any transportation service and the refusal to place cars upon reasonable demand, must also be published and filed.

Or, conversely, it can be said that the right of gas plants and other public utilities to have preferential loading and transportation of coal, should have been embodied in tariff publications. Then if defendant in error was given and received a service thus denied to it, because it was not a member of the preferred class, its culpability would be complete. Otherwise, what is there to measure discrimination, concession or advantage?

The orders of the Commission upon which the Government has predicated its indictment, are not tariffs fixing the standard or quantity of service to which defendant in error was entitled. We have heretofore adverted to the fact that under paragraph (13) of section 1 of the Interstate Commerce Act, the Commission might have required the carriers to publish and file the rules and regulations pertaining to car service prescribed by it, but it did not do so. We submit then, that its order cannot support what Congress intended should serve as the criterion.

Armour Packing Co. v. United States, 209 U. S. 56, 72:

> "* * * the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

But the *Armour case* must be understood in the light of *Lehigh Coal & Navigation Co. v. United States,* 250 U. S. 556, 563-564:

> "It is in effect the contention of the Government that the language of the case exhausts definition and excludes the supposition of the questions of the Circuit Court of Appeals. We are unable to concur. The language of the case is easily explained by the question that was presented for decision. The Armour Packing Company contended that the act was directed only at fraudulent conduct, the obtaining of a rebate by some dishonest or underhand method, concession or discrimination. The language of the court was addressed to this contention and its selection and adequacy are manifest.
>
> "No such contention is made in the case at bar and there are other distinguishing elements. It will be observed that by the statute and the decision the test of equality is the tariff rate. It was said in the opinion that it is 'the purpose of the act to punish those who give or receive transportation, in the sense of actual carriage, at a concession from the published rates' *(New York Central R. R. Co. v. United States,* 212 U. S. 500, 505). And such was the offense of the Armour Packing Company. There was no evasion of the tariff rate in the case at bar."

New York, New Haven & Hartford v. Commission, 200 U. S. 361, 391:

> "It cannot be challenged that the great purpose of the act to regulate commerce, whilst

> seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs and forbidding rebates, preferences, and all other forms of undue discrimination."

United States v. Union Stock Yards, 226 U. S. 286, 309:

> "If these companies had filed their *tariffs*, as we now hold they should have filed them, *they would have been subject to the restrictions of the Elkins Act as to departures from published rates* • • • and we must consider the case in that light • • • and *this preferential treatment*, as we have said, *would have been in violation of that act.*" (Italics ours).

If the dealings between the carrier and the shippers in the foregoing case were not cognizable under the Elkins Act, because the facilities and privileges were not published and filed, the necessity for publication and filing are present here, if the indictment is to stand.

Throughout the Interstate Commerce Act, wherever Congress saw fit to make the violation of a Commission order a crime, or to impose a penalty for such violation, it did so in express terms. Witness Sec. 1 17 (41 Stat. 477), (24) (40 Stat. 272); Sec. 6 (10) (36 Stat. 539); Sec. 16 (8) (34 Stat. 584); Sec. 20 (6),

(7) (24 Stat. 379; 34 Stat. 584; 41 Stat. 493); Sec. 20a (11) (41 Stat. 494); Sec. 26 (41 Stat. 498).

Sec. 1 (17):

> "* * * and in case of failure or refusal on the part of any carrier, receiver, or operating trustee to comply with any such order or direction such carrier, receiver, or trustee shall be liable to a penalty of not less than $100 nor more than $500 for each such offense, and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

Sec. 1 (24):

> "And it shall be the duty of any and all the officers, agents, or employees of such carriers by railroad or water or otherwise to obey strictly and conform promptly to such orders, and failure knowingly and willfully to comply therewith, or to do or perform whatever is necessary to the prompt execution of such order, shall render such officers, agents, or employees guilty of a misdemeanor, and any such officer, agent or employee shall upon conviction, be fined not more than $5,000 or imprisoned not more than one year, or both, in the discretion of the court."

The foregoing penalty was imposed for the violation of any preference or priority order of the President, made, during the late World War, either by

him directly or through the Commission or some other agency.

Sec. 16 (8):

> "Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this Act shall forfeit to the United States the sum of $5,000 for each offense."

3. EXCEPT AS THE THING IS ONLY OFFERED OR SOLICITED THE ELKINS ACTS FORBIDS ONLY COLLUSIVE DEALINGS BETWEEN CARRIER AND SHIPPER AS TO TARIFF RATES, RULES, PRACTICES AND REGULATIONS.

(a) The word "Device" (Section 1) does not qualify the second "whereby" clause, but relates only to published rates.

Counsel for the Government, in their analysis of the Elkins Act (Brief, pp. 21-23), italicize the phrase "*by any device whatever,*" seeking, we assume, to make it qualify the clause prohibiting the giving of "any other advantage" or the practicing of any "other discrimination." The Government's case admittedly must rise or fall upon the Elkins Act (Brief p. 44), and also, apparently, upon a strained construction of that phrase found in the Act. The language and the sense of the second "whereby" clause, we contend cannot be so distorted. Each clause is separate and distinct in itself. The very structure of the sentence

disproves any other claim. It is unlawful for any person to offer, grant or give, or to solicit, accept, or receive any rebate, concession or discrimination in respect to the transportation of property, (1) "*whereby* any such property shall by any device whatever be transported at a less rate than that named in the tariff published and filed by the carrier," etc.; (2) "*or whereby* any other advantage is given or discrimination is practiced." (Italics ours.) Congress had previous to the enactment of the Elkins Act employed the word "device" in legislation relating to common carriers. See section 10 of the Interstate Commerce Act. There the word, in each instance, is used to describe the means employed to secure transportation at less than the published rate. The word is again used in the same sense in the last paragraph of section one of the Elkins Act. Neither act knows any device employed to obtain in the physical act of transportation, unassociated with the rate charged for the service.

We are not unmindful of the definition assigned to the word by the Court in *Armour Packing Company v. United States,* 209 U. S. 56, 71, but the decision there was addressed to a violation of the first "whereby" clause, and the Court in *Lehigh Coal & Navigation Co. v. United States,* 250 U. S. 556, said that the language of the Armour case is easily explained by the question that was presented for decision, it being addressed to the question of fraudulent conduct and its selection and adequacy are therefore manifest.

The Government does not, and indeed it cannot contend that a shipper is to go unpunished, who, through device, artifice or fraud practiced upon a carrier and without its knowledge or consent, obtains transportation at less than the published rates, Section 10 of the Commerce Act covers such an offense. But there Congress was specific. If one knowingly and wilfully pays less than the published rate, through the use of any named device, "whether with or without the consent or connivance of the carrier," etc., he shall be deemed guilty of a fraud.

The lower court therefore rightly takes section 10 into view in arriving at the intention of Congress in the passage of the Elkins Act.

Tariff rates are not here involved. The defendant was indicted because of its bare act in securing transportation, when such service was presumed to be denied to it by an order of the Commission. And why did Congress prohibit the securing, through any *device* or means, of a *rate* lower than the published rate and yet fail to prohibit the securing of *transportation* through similar methods or instrumentalities?

Interstate Commerce Commission v. B. & O. R. R., 145 U. S. 263, 275, 276:

> "Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act, 24 Stat. 379, c. 104, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which

demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable.

* * * * *

"The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discrimination in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights."

The Act to Regulate Commerce was not intended to restrict, but was in aid of transportation. In enacting the statutes establishing the Interstate Commerce Commission, the purpose of Congress was to facilitate and promote commerce. *Texas & Pacific Railway Co. v. Interstate Commerce Commission*, 162 U. S. 197, 198. Only with the passage of the Transportation Act of 1920 did Congress see fit by legislative enactment to impose limitations upon and to permit preferences and priorities in the transportation of property. At common law and under the original act to regulate commerce, "in case of car shortage occasioned by unexpected demands," the carriers were "bound to treat shippers fairly, if not identically." *Penna. R. R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 133. And while the opinion in the case goes on to say that, in deter-

mining how the inadequate supply shall be distributed, *it might be necessary* to consider the character of the freight tendered, there was up to the time of the promulgation of the Commission's service orders, no legally prescribed or recognized standard for the distribution of facilities. In saying this we have not overlooked or disregarded the case of *United States v. Metropolitan Lumber Co.*, 254 Fed. Rep. 335.

(b) Under the express language of the Act where granting or giving, accepting or receiving is charged, there must be a co-transgressor.

Section 1 creates three separate and distinct correlative offenses on the part each of the carrier and shipper: (1) The offering or soliciting of a rebate, concession or discrimination; (2) The granting or accepting of a rebate, concession or discrimination; and (3) The giving or receiving of a rebate, concession or discrimination. *United States v. Bunch*, 165 Fed. Rep. 736.

Counsel's discussion of the conjunctive "and" and disjunctive "or" in order to come to the thing Congress had in mind, is hardly persuasive. We do not argue for a reading of the correlative phrases as if the word "and" should replace "or." Such a substitution would give an absurd effect to the section. Supply "and" and, in the language of the statute, a carrier must not only "offer" but also "solicit," not only "grant," but "accept"; not only "give," but "receive" the same thing prohibited. Likewise, with a shipper. Nor do we ask for "verbal nicety"

but we simply ask for that sense of the words which best harmonizes with the context of the Act.

There may be a crime if the rebate, concession or discrimination is offered, although not solicited, and the inhibited favor may be solicited but not offered and yet the crime is complete. Such offenses may be solicited and offered, and both the shipper and carrier would be held. But the elements of a crime are not present where only acceptance or receipt is charged. To complete either as an offense, there must be a granting or giving. There must be a co-transgressor, from whom the rebate, concession or discrimination springs.

A case under the act is not made out, in fact, a sufficient one is negatived, by the allegation that the concession was "obtained by deception practiced" by the defendant upon the carriers "whereby an advantage was given by those carriers * * *
and which said common carriers, but for said deceptive billing, device and deception, would not have granted defendant" (Paragraph 6 of count 1 of the indictment, R. 8).

Such an averment attempts to read into the law something not found there, stated either expressly or by fair implication. Concession implies a prior demand. A "concession" is what the shipper solicits, accepts or receives. How does the act specifically define or qualify the term? It is a thing "whereby any other advantage is given or discrimination is practiced." Directly and expressly, as a statutory

thing, an *advantage* is not something *accepted* or *received*. It is something "*given*." Only by implication is it a thing *accepted* or *received*, made so because it is *given*. An advantage is unlawful only as it qualifies and characterizes a rebate, concession or discrimination. Those are the direct, express things which the shipper must not have. Webster's *New International Dictionary* says a concession is: "1. Act of conceding or yielding; usually implying a demand, claim, or request, and thus distinguished from *giving*, which is voluntary or spontaneous"; and "3. A thing yielded; an acknowledgment or admission; a boon; a grant; esp., a grant by government or other authority of land, property, or a privilege or right to do something; as, a *concession* to build a canal." The legislature in qualifying and coloring the word concession with the phrase "whereby any other advantage *is given* or *discrimination* is practiced," still preserves Webster's meaning. The concession may result in a giving, but it starts with a demand. In other words, when there is a concession, there is first the request by one party, then the yielding, which results in the giving by the other party. The concession is therefore bilateral. If a concession is obtained or received, it must also be yielded or given. It is also clear that the words offer, grant or give, and solicit, accept or receive are correlative in meaning. Is it not fair, then, to say that if it were intended to make criminal the *taking* of an advantage apart from its being *given*, the statute could have made it plain that such was its meaning?

The Elkins Act makes no mention of *deception* or *deceptive billing*. Those terms have been imported. By the use of them a case under the act is not made out. Consciously or unconsciously, the pleader has drawn from section 10 (3) of the Interstate Commerce Act (36 Stat. 539), which, of course, can have no application here. False or deceptive billing is made punishable, by that section, only as it obtains or attemps to obtain transportation of property at less than the regular rates printed, published and filed. Securing transportation without any effect upon published rates, is not within the prohibition of the section.

4. THE DECISIONS OF THIS COURT DO NOT SUPPORT THE CONTENTION OF THE GOVERNMENT THAT THE TAKING OF A "CONCESSION" OR AN "ADVANTAGE" BY A SHIPPER, THERE BEING NO COLLUSION ON THE PART OF THE CARRIER, IS A CRIME, PUNISHABLE BY THE ACT.

The Government is not as helpless as counsel are pleased to picture it. (Brief pp. 28 *et seq.)* The carrier, as we have previously pointed out, must print, publish and file its tariffs. If it wilfully fails to do so, or if it fails strictly to observe such tariffs so filed, it is guilty of a misdemeanor. (Section 1, Elkins Act.) A wrongful and conspiring act on the part of the shipper is not necessary to complete the crime thereby committed by the carrier. Under such a state of the law, how can it be argued that there is a "double burden" upon the Government? Why does it become necessary to prove a conspiracy? Nor can it be con-

tended that a conspiracy must be shown if the carrier unlawfully commits any of the other acts recited. Section 10 (1) of the Commerce Act again fixes the punishment.

Without, in the slightest degree, contending for a narrow construction, we can further answer the plaintiff in error by saying Congress meant only what it said, and it is not for the prosecuting arm of the Government to seek to extend that body's express enactment to cover conduct not within the legislative mind.

To assume within the field of morals the worst possible aspect of the charge, is it any more wrongul to misbill property, to secure a lower rate, than it is by an imposition to obtain transportation when such service is deemed to be denied? Yet Congress has plainly provided that misbilling does not require the consent or connivance of the carrier to establish the crime, and the law under which the Government has called the defendant in error to book says not a word about lack of consent or connivance. Was such an omission intentional or was it an oversight by Congress? The plaintiff in error would apparently strike from the misbilling statute (Section 10 (3) of the Interstate Commerce Act) the phrase "without the consent or connivance of the carrier," and not be disturbed one whit by the outcome.

Counsel (Brief p. 30) state three instances where common carriers cannot function, if the lower court is upheld. Instance (a) is the case at bar.

We fear it is somewhat overstating the case to say under (b) that for information as to car ratings, the carrier is dependent upon the mine or shipper. Has not the carrier its own source of information? Does it not know how many cars it has supplied the affiant in the past?

The embargoes discussed under (c) may not be legal. Indeed, there has for a great many years been serious doubt among carriers as to the legality of their embargoes. See *Menasha Paper Co. v. Chicago & Northwestern Railway Company*, 241 U. S. 55, 59.

The case of *Missouri, Kansas & Texas Ry. Co. v. Harriman*, 227 U. S. 657, 671, was a civil case, and the excerpt quoted therefrom (Brief, p. 31) appears to be an inadvertence in reference by the Court. To misbill property is expressly cognizable under section 10 (3) of the Interstate Commerce Act. Harriman, the Court said, made an undervaluation of his property which had the effect of securing the lower of two published rates. The Government has uniformly, as to such cases, insofar as they are reported, resorted for prosecution to section 10 (3) of the Interstate Commerce Act.

United States v. Metropolitan Lumber Co., 254 Fed. Rep. 335, 344:

> "While the remarks of Mr. Justice Lurton in *Mo., Kan. & Tex. Ry. Co. v. Harriman*, 227 U. S. 657, 671, 33 Sup. Ct. 397, 57 L. Ed. 690 (second paragraph), are susceptible of the inference which the government seeks to draw

from them, and, if interpreted in that light, would fully support the views here expressed, I am not, owing to the facts of that case, sufficiently persuaded that they may be properly considered as an expression of an opinion of the Supreme Court on the point in question. I incline to the belief that the court had reference rather to the fact that the acts therein referred to produced a discrimination which the Elkins Act prohibited, rather than that such acts were necessarily criminal under that statute."

United States v. Union Mfg. Co., 240 U. S. 605, 611:

"In denouncing as criminal 'false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or other device or means' employed in order to 'obtain or attempt to obtain transportation for such property at less than the regular rates then established,' the lawmaker regarded not merely the physical transportation of the property, but the entire transaction through which consignor or consignee might seek to evade the policy of the Act to subject all interstate shipments to uniform rates of charge prescribed in published tariffs."

See also:

United States v. Sterling Salt Co., 200 Fed. Rep. 593.

United States v. Vacuum Oil Co., 153 Fed. Rep. 598, proves nothing except what is readily admitted,—that

it is a *concession* for a shipper knowingly to pay less than the published rate, when the assessment is knowingly made by a carrier. That both the shipper and carrier participated in the wrongful act, is made clear by the companion case of *United States v. Pennsylvania R. R. Co.*, 153 Fed. Rep. 625. The language of the *Oil Company* case necessarily takes only that situation into view.

Likewise, the offenses charged against the defendant in *United States v. Hocking Valley Ry. Co.*, 194 Fed. Rep. 234, were participated in by the shipper. See *United States v. Sunday Creek Co.*, 194 Fed. Rep. 252. It is hard to see how the language from any case of conscious, joint participation can serve to maintain the proposition announced at the outset (Brief, p. 27), that concerted or collusive action of shipper and carrier are unnecessary.

The case of *United States v. Metropolitan Lumber Co.*, 254 Fed. Rep. 335, is the Government's chief reliance insofar as the decided cases go. Knowledge or connivance on the part of the carrier is held not to be essential. The court speaks (page 343) of the purpose which Congress had in mind in passing the Elkins Act. That intention, we have unquestionably shown, was simply to make criminal all collusive dealings between carrier and shipper; not primarily, as the court holds, to punish the beneficiary of "*favoritism and inequality of treatment.*"

We here use the exact language which the court used and in the sense meant, but the phraseology is not apt. "Favoritism" connotes one from whom a

favor consciously springs; "inequality of treatment" one who knowingly treats.

It is said that to limit the operation of the act only to such transactions as are consciously participated in by *both the shipper and carrier* would free *both the carrier and shipper* from criminal responsibility in all cases where the *shipper* could, without the knowledge of the *carrier*, secure advantage and discriminations in transportation service by means not violative of section 10 of the Interstate Commerce Act and the Act of June 18, 1910. (Ch. 309, Sec. 10, 36 Stat. 539.)

The Elkins Act is based on knowledge of the wrongful transaction. It does not require the construction which the court deprecates for the carrier to be absolved. The carrier concerned in the case before that court was not, so far as appears, found guilty. Would there have been a conviction of the carrier, then, if the contention of defendant had been upheld?

B. DEFENDANT IN ERROR DID NOT OBTAIN A DISCRIMINATION, CONCESSION OR ADVANTAGE IN TRANSPORTATION. THE COMMISSION'S SERVICE ORDER No. 23, PARAGRAPH 7 (GOVERNMENT'S BRIEF, P. 47) PRESCRIBED "CLASSES OF PURPOSES" AND "ORDER OF CLASSES" ONLY WITH RESPECT TO CAR SERVICE. THE COMMISSION HAD NO DELEGATED POWER AT THE TIMES ALLEGED, TO FIX PREFERENCES AND PRIORITIES IN CAR SERVICE.

Counsel say (Brief, p. 17) that all questions of constitutional law and lack of power in the Commission have been foreclosed by the decision of this Court in the *Avent Case*, 266 U. S. 127. But our demurrer, as

we at the outset stated, raises objections not of such a nature, and yet, in addition to the application of the Elkins Act.

Paragraph 1 of Service Order No. 23 (Government's Brief, p. 45 *et seq.)* directs the carriers to give preference, and priority in movement, among other things, to coal, not according to any preferred uses or purposes, but generally and only as a commodity.

> "That each such common carrier by railroad, to the extent that it is currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its line or lines of railway, shall give preference and priority to the movement of each of the following commodities: food for human consumption, feed for live stock, live stock, perishable products, *coal,* coke and fuel oil." (Italics ours).

Section 7 provides:

> "That in the supply of cars to mines upon the lines of any coal-loading carrier, such carrier is hereby authorized and directed, to place, furnish and assign such coal mines with cars suitable for the loading and transportation of coal in succession as may be required for the following classes of purposes, and in following order of classes, namely:" etc.

The directions given and the restrictions attempted to be imposed by paragraph 7 relate only to car service, to the placing, furnishing and assigning of cars which are suitable for the loading and transportation

of coal. The mere qualifying use of the phrase "transportation of coal" is not the equivalent of a summary direction or requirement that transportation be undertaken and accomplished.

Peoria & Pekin Union Railway Company v. United States, 263 U. S. 528, 532:

> "The Commission possessed no emergency power prior to the so-called Esch Car Service Act, May 29, 1917, c. 23, 40 Stat. 101. Its provisions were amended by Transportation Act 1920; and in the amended form are introduced as paragraphs 15 and 16 of s. 1 of the Act to Regulate Commerce and as paragraphs 4 of s. 15. 41 Stat. 476-7, 486. Paragraph 15 deals in sub-paragraphs (a) and (b) with car service; in sub-paragraph (c) with the common use of terminals; in sub-paragraph (d) with preferences in transportation, embargoes, and movement of traffic under permits. Paragraph 16 and the amndment to s. 15 confer emergency power to re-route traffic and to 'establish temporarily such through routes as in its (the Commission's) opinion are necessary or desirable in the public interest.' None of these provisions grants in terms power to require the performance of a transportation service. The specific grant in paragraph 16 of emergency power to 'make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines or roads,' and the omission of any reference to switching, tend to rebut an intention to grant the power here asserted. The order can-

not be justified as dealing with preferences in transportation or embargoes under sub-paragraph (d). Nor does the order provide for the joint use of terminals under sub-paragraph (c); since it does not purport to authorize the Minneapolis & St. Louis to use the tracks and terminals of the Peoria Company. The contentions mainly urged are that the order is one concerning car service under sub-paragraph (b); or that power to require switching should be held to have been granted by implication.

The argument that the authority of the Commission over car service should be construed to include the requiring of switching rests upon paragraph 10 of amended S. 1 of the Act to Regulate Commerce. But 'car service' connotes the use to which the vehicles of transportation are put; not the transportation service rendered by means of them. Cars and locomotives, like tracks and terminals, are the instrumentalities. To make these instrumentalities available in emergencies to a carrier other than the owner was the sole purpose of sub-paragraphs a, b and c. It is to this end only, that provision is made by paragraph 10 for the 'movement, distribution, exchange, interchange, and return of locomotives, cars and other vehicles used in the transportation of property.' This is substantially the same expression as was used in the Esch Car Service Act. The 1920 Act merely adds locomotives and other vehicles.

Transportation Act 1920 evinces, in many provisions, the intention of Congress to place upon the Commission the administrative duty

> of preventing interruptions in traffic. *But there is no general grant of emergency power to that end; and the detail in which the subjects of such power have been specified precludes its extension to other subjects by implication.* Moreover, switching service differs in character from those as to which such power is expressly granted. These involve either the use by one carrier of property of another or the direction of the manner and the means by which the service of transportation shall be performed. The switching order here in question compels performance of the primary duty to receive and transport cars of a connection carrier." (Italics ours.)

There is no averment in the indictment that the rules, regulations or practices prescribed by the service order were printed by the carriers, filed with the Commission and posted to the public. We can assume that such was not done, and that there was no requirement by the Commission that it should be done. The directions of the Commission, then, must have been addressed solely to the carriers, and having been so addressed, there could be no departure from or violation of them by defendant. In view of this situation, no concession, advantage or discrimination was received by defendant.

"Preference or priority in transportation" assumes that the cars are awaiting movement, after having been distributed and loaded,—in what manner Congress has not indicated or left the determination thereof to the Commission, except that the carriers

and the Commission are charged with the duty of seeing that the distribution is just and reasonable. The Emergency Fuel Act (Act of September 22, 1922, c. 413, 42 Stat. 1025) operative during an express period after the transactions in question and for the avowed purpose of amending paragraph 15 of section 1, of the Interstate Commerce Act, provided that the powers of the Commission were thereby "enlarged to include the authority to issue in transportation of coal or other fuel *orders for priorities in car service, embargoes,*" etc. (italics ous).

The penalty provided by paragraph (17) of section 1 for failure to observe the orders and directions of the Commission, is upon the carrier only. This unquestionably shows the legislative intention. We have herein before adverted to the penalties provided for by section 10 of the Commerce Act, and how, in the beginning, the prohibitions against false billing were addressed to the carrier alone, and how, later, the shipper was made subject to similar provisions. A like growth in legislative enactment appears from a consideration of the Emergency Fuel Act. There, for such things as were here done, a penalty was expressly declared against the shipper.

CONCLUSION

Defendant in error has shown that the Commission's service order is not a tariff or schedule within the contemplation of the Elkins Act; that if it was designed to fix a standard of service, publication and

filing by the carriers were necessary; that, no matter how morally wrong it might have been to practice the deception charged, no offense was committed under the Elkins Act; that the Court will not strain language, in order to create an offense, "based chiefly upon a consideration of the mischief which the legislature sought to remedy"; that the Commission's service order called for the "preference and priority" of coal in *transportation* only as a commodity; and that whereas "classes of purposes" and "order of classes" were established only as to *car service,* defendant in error has been indicted for securing in *transportation* a higher class of purposes and order of classes than the service regulation permitted him to have; and that the Commission had no power to fix "preferences and priorities" in *car service* until the passage of the Emergency Fuel Act.

For these reasons, defendant in error submits the judgment of the District Court should be affirmed.

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March 3, 1926.